No. 491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

GALAX MIRROR COMPANY, INCORPORATED, MOUNT AIRY MIRROR COMPANY, AND J. A. MESSER, SR., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR PETITIONERS

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OPINION BELOW

The opinion of the Court of Appeals (R. 848-858)[1] is reported at 260 F. 2d 397.

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[1] Citations refer to joint transcript of record in Nos. 489 and 491.

JURISDICTION

The judgment of the Court of Appeals was entered on October 6, 1958 (R. 858). A petition for a writ of certiorari was filed on November 4, 1958, and was granted, limited to the first question presented, on December 15, 1958 (R. 860). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE AND RULE INVOLVED

Section 1 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. 1, commonly known as the Sherman Act, provides, in pertinent part, as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor * * *.

Rule 6(e) of the Federal Rules of Criminal Procedure, 18 U.S.C., provides as follows:

> (e) *Secrecy of Proceedings and Disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy

may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

QUESTION PRESENTED

Whether the denial of defendants' motion at the trial for production of the relevant grand jury testimony of the principal prosecution witness for purposes of cross-examination constituted error.

STATEMENT

On March 26, 1957, an indictment was returned by a grand jury in Roanoke, Virginia, charging a conspiracy to fix the prices of plain plate glass mirrors in violation of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1 (R. 692-699). Named as defendants in the indictment were seven mirror manufacturing companies in Virginia and North Carolina, including petitioners Galax Mirror Company, Inc. ("Galax") and Mount Airy Mirror Company ("Mount Airy") (R. 692-693).[2] In addition, three company executives, including petitioner J. A. Messer, Sr., chairman of the board of directors of Galax and Mount Airy, were named as individual defendants (R.

[2] The other corporate defendants were Pittsburgh Plate Glass Company ("PPG"), petitioner in No. 489, a supplier of plate glass to mirror manufacturers and itself a mirror manufacturer in North Carolina; Carolina Mirror Corporation ("Carolina"); Stroupe Mirror Company ("Stroupe"); Virginia Mirror Company, Inc. ("Virginia"); and Weaver Mirror Company, Inc. ("Weaver").

693-694).[3] The Mirror Manufacturers Association, a trade association, and all other mirror manufacturers in Virginia and North Carolina were named as co-conspirators (R. 694).

The single-count indictment alleged that defendants and co-conspirators had, beginning in October, 1954, engaged in a continuing conspiracy to stabilize and fix the prices of plain plate glass mirrors sold in Virginia and North Carolina to furniture manufacturers (R. 697). The methods allegedly used in carrying out the conspiracy were the adoption and use of identical list price schedules as a "base" for the quotation of prices and agreement upon a uniform discount from list prices (R. 697-698).

The Industry

The corporate defendants manufacture and sell mirrors; a substantial portion of these sales are made to furniture manufacturers (see R. 695-697). Mirrors are manufactured by applying reflecting and protective coating to polished plate glass. The term "plain plate glass mirror" refers to a basic mirror with straight clean-cut edges and without engraving or other decorations (see R. 788). Such mirrors may be "fabricated," usually at additional cost, by bevelling and polishing their edges or by adding engraving and other surface decorations (R. 789).

The prices for the approximately 2000 sizes of plain plate glass mirrors are determined from list prices contained in a schedule which has been used in the

[3] The other individual defendants were Edd F. Gardner, president of Carolina, and W. A. Gordon, manager of plate glass sales for PPG.

industry since April, 1950 (see R. 168-169; G. Ex. 61, R. 60, 585-609; G. Ex. 17, 26, R. 839, 842). The list prices do not approximate actual selling prices but are instead several times higher. Actual selling prices are determined by applying to the list prices the percentage discount specified by the particular manufacturer. Prices are raised or lowered by adjusting the percentage discount. For example, lowering the discount off list from 80 percent to 78 percent would increase prices by 10 percent. The Government did not contend that this mode of pricing was in itself illegal.

The Alleged Conspiracy

The conspiracy charged in the indictment allegedly arose out of two meetings held in a single week in late October of 1954 (R. 433). These meetings were followed promptly by a general rise in the price of mirrors. Several pertinent facts regarding the economic situation in the mirror industry at the time of these meetings may be noted. First, the industry had been subject to an extended price war (R. 180, 196). Second, there was a shortage of plate glass available for the manufacture of mirrors due to severe hurricane damage and an unusually high demand for plate glass on the part of auto manufacturers (R. 309-311, 318-319, 330-331). Third, there was an increased demand for mirrors on the part of furniture manufacturers, who constituted the single largest source of business for the mirror industry (R. 309). This shortage and increased demand left the mirror manufacturers in short supply of plate glass (R. 309, 311).

The first of the two meetings in question, a semi-annual convention of the Mirror Manufacturers Association, held at Asheville, North Carolina, on October

24-27, 1954, was attended by representatives of all the defendant companies (R. 116-119; G. Ex. 64-65, R. 612-619). The second meeting, held on October 28, 1954, at "The Bluffs," an inn on the Blue Ridge Parkway, was attended by defendant J. A. Messer, Sr., representing defendants Galax and Mount Airy; by representatives of defendants Stroupe and Carolina; and by A. G. Jonas, president of Lenoir Mirror Company ("Lenoir"), a mirror manufacturer in North Carolina (R. 190, 225-226). Neither Jonas nor Lenoir was indicted, and Jonas became the principal Government witness at the trial. Directly following the meeting at The Bluffs, the defendant companies, among others, sent out letters to the trade announcing an increase in the price of plain plate glass mirrors to a discount of 78 percent off list (G. Ex. 8, 16, 25, 30, 37, 51, 56-60, 90; R. 57, 250, 531, 539, 550, 556, 560, 576, 580-584, 634).

In late 1956, a grand jury in Roanoke, Virginia, commenced an investigation concerning possible antitrust violations in the mirror industry in Virginia and North Carolina (see G. Ex. 46, R. 566-569; D. Ex. 14, R. 74, 640-643). A. G. Jonas of Lenoir testified before the grand jury on three separate occasions (R. 263). This indictment was returned on March 26, 1957 (R. 699).

The Trial

The trial before a jury began on November 18, 1957, in the United States District Court for the Western District of Virginia, at Roanoke (R. 1). The Government's case was directed almost entirely to the events of the week beginning October 24, 1954, during which the two meetings were held and subsequent price

announcements made. The Government did not attempt to prove a continuing conspiracy, as alleged in the indictment (see R. 71, 78).

1. The Asheville Convention

The testimony regarding the Mirror Manufacturers Association convention at Asheville showed that J. A. Messer, Sr., representing Galax and Mount Airy, had stated to Robert Stroupe of Stroupe and Kenneth Hearn of Virginia that he planned "to send out a letter announcing a price change to 78," about a 10 percent increase (R. 213; see D. Ex. 1, R. 635). Messer's statement apparently touched off discussion of a price increase among the mirror manufacturers assembled at the convention (R. 172-176, 212-214, 812-813). On the evening of October 27, 1954, Robert Stroupe and Ralph G. Buchan of Carolina were present in Hearn's hotel room when Hearn made a long-distance phone call to A. G. Jonas of Lenoir (R. 177-178, 217). Lenoir was not then a member of the Association and did not have a representative at Asheville (R. 119, 231). During the phone conversation, in which Hearn, Stroupe and Buchan all participated, Jonas was informed of Messer's statement that "he was going to raise his price to 78 percent" (R. 219; see R. 178-181, 217-218). Jonas said that "he wouldn't believe anything John Messer said at any time" (R. 180) and that "[i]t didn't sound like him wanting to raise prices" (R. 245). Robert Stroupe "didn't believe" Messer either (R. 213-214). Their disbelief apparently stemmed from Messer's reputation in the trade as a price cutter (see R. 196, 278, 282). Nevertheless, Jonas asked Hearn to have W. A. Gordon of PPG, Jonas' personal friend who was present at Asheville, call him (R. 219, 237). Gordon simply told Jonas that he had heard some discussion at the convention regarding the desirability of a price

increase (R. 238). On the next morning, October 28, 1954, Jonas and Hearn arranged a meeting to be held that day at The Bluffs (R. 241).

2. The Meeting at The Bluffs

The meeting at The Bluffs was attended by Messer, Jonas, Grady V. Stroupe, president of Stroupe, and Ralph Buchan, representing Carolina (R. 190, 225-226). The testimony regarding the events of this meeting varied materially.

Both Buchan and Grady Stroupe testified that the meeting began with Messer repeating his statement made at Asheville that he was "going to send out a letter lowering the discount to 78," thus raising his prices (R. 226; see R. 196). A "terrific hassle" between Messer and Jonas then ensued, and Buchan thought that "there might be a free-for-all break out at any time" (R. 196). Grady Stroupe testified that Messer "got very red in the face" and he thought that Messer "was going to have a stroke" (R. 226). The dispute appeared to stem from a discussion of whether Jonas or Messer had touched off the existing price war in the industry (R. 277-278, 282; see R. 196). Buchan thought that there was "pretty bitter feeling" (R. 180) between the two and testified that Jonas called Messer "the worst price cutter there was living" (R. 196; see R. 282).

This dispute was apparently followed by a discussion of prices. Discounts of 77, 78 and 79 percent off list were each discussed, and the consensus was that a price increase to a discount of 78 was feasible in light of the economic situation (R. 197-198, 227-228). The testimony was that Messer then said that he wanted each of the companies represented to issue at the same

time a letter announcing a price increase (R. 196, 202, 227). Grady Stroupe objected to this suggestion because he thought that a price increase was "an individual proposition" to be determined separately by each manufacturer (R. 227-228; see R. 196-197). Buchan pointed out that he "had no authority regarding prices" and "couldn't commit Carolina Mirror regarding anything" (R. 201). The meeting ended on an unfriendly note (R. 230). Both Buchan and Grady Stroupe testified that "as we were leaving" Messer said that "we could all go to hell, he was going to raise his price to 78 and we could do what we wanted to" (R. 205; see R. 228, 230).

Neither Buchan nor Grady Stroupe testified that an agreement to increase prices had been reached at the meeting. Moreover, Buchan did not recall any mention of mirror manufacturers who were not represented there; of previous price discussions at Asheville; or of notifying other mirror manufacturers concerning the outcome of the meeting (R. 202-203).

However, Jonas, the Government's final and principal witness, "just assumed that everything we were there for had come out of the Asheville meeting and it was all hinging on me" (R. 243); he testified that he was "the stumbling block" and that there "would not be any increase if I didn't agree to do so" (R. 237). According to Jonas, Messer did not indicate that he was "going to" raise his prices (see R. 196, 226) but merely that he "wanted to" (R. 242). Jonas said that after he had obtained the "assurance" of the others that they would "stick by" a price increase he agreed to raise his own prices (R. 244). He testified that "we just agreed that the 78 percent was a fair price and we

would go along on that basis" (R. 244). And he said that after "letting Mr. Messer dictate, we had to follow his agreement that we would all write letters on October 29, changing our discount" (R. 245).

Jonas testified further that arrangements were made to notify the other mirror manufacturers concerning the "outcome of the meeting" (R. 246-247). He recalled stating that he "would take care of" PPG and two non-defendant mirror manufacturers in North Carolina (R. 247). He "imagine[d]" that the others were to notify the remaining mirror manufacturers (R. 246). Unlike Buchan and Grady Stroupe, Jonas testified that he did not recall Messer's parting statement that the others "could all go to hell, he was going to raise his price to 78 and [they] could do what [they] wanted to" (R. 283; see R. 205, 228, 230).

3. Motion for Production of Grand Jury Testimony

At the conclusion of direct examination of Jonas, defense counsel requested permission of the trial judge to examine Jonas briefly, in the absence of the jury, regarding his appearances before the Roanoke grand jury (R. 258-259). The following colloquy then occurred (R. 259):

> "The Court: All right, sir; then what?
>
> "Mr. Humrickhouse: Then I want to move for the production of the Grand Jury minutes.
>
> "The Court: Exactly what I thought you were, and you are not going to get them.
>
> "Mr. Humrickhouse: We want to make the record.
>
> "The Court: Unless you can show some sound basis that contradicts between what happened in the Grand Jury room and his testimony before

> the Grand Jury and his testimony in this trial, I am not going to require the production of the Grand Jury records. It would be easy for any attorney to get access to the records of the Grand Jury by just such a motion as you are making here.
>
> "Mr. Humrickhouse: No, sir, your Honor, we are not attempting that. We want just a transcript of his testimony before the Grand Jury regarding the subjects to which he has testified on direct examination."

After some additional discussion, defense counsel examined Jonas for purposes of the record (R. 263). Jonas testified that he had appeared before the Roanoke grand jury on three occasions and that his testimony there covered the "same subject matter" as his testimony at the trial (R. 263). Prior to defendants' motion, Government counsel had admitted using Jonas' grand jury testimony in preparing for direct examination of Jonas at the trial (R. 251) and had made repeated use of grand jury testimony in examining other witnesses (R. 171-172, 221). Nevertheless, defendants' motion for production of the relevant portion of Jonas' grand jury testimony was denied (R. 264).

4. Conclusion of Trial

Defendant Messer, a man of advanced years, did not testify. Dr. David C. Wilson of the University of Virginia, a specialist in neurology and psychiatry, testified that he had performed an exhaustive medical examination of Messer (R. 321-323). Dr. Wilson found that Messer had for some time been afflicted by severe hardening of the arteries, particularly in the brain, and had experienced several minor strokes (R. 325-326). As a result, Messer had suffered an

extreme loss of memory, and the memory which he still retained was rendered unreliable (R. 324-327). Dr. Wilson testified that Messer had a "denial syndrome" and was likely to "fabricate" in order to conceal gaps in his memory (R. 324-325, 327). Although he had exercised full control over the pricing policies of Galax and Mount Airy during the period in question and had attended both the Asheville convention and the meeting at The Bluffs, Messer's recollection of this period was vague and unreliable (R. 326-327).

Defendants, at the close of their case, introduced evidence of actual price behavior during the period immediately following the alleged formation of the price agreement (R. 345-384; D. Ex. 35-36, R. 352, 372, 690-691). A detailed accounting study analyzing sales made by the defendant companies during the month of November, 1954, clearly showed an absence of price uniformity. Only about a quarter of the dollar volume of sales were made at the allegedly "agreed" price of 78 percent off list (D. Ex. 35, R. 352, 690).

At the close of the evidence defendants requested various jury instructions to the effect that Jonas' testimony should be received with caution because he was an accomplice or co-conspirator (R. 418, 703-704). The trial judge refused to give such an instruction (R. 422-423).

On December 3, 1957, the jury returned a verdict of guilty against all seven corporate defendants and the two remaining individual defendants (R. 518).[4] The trial judge then assessed fines against each of the de-

[4] The trial judge had granted a motion for acquittal as to defendant W. A. Gordon of PPG at the close of the Government's case (R. 285-289).

fendants (R. 526-530). Galax was fined $4,000, and Mount Airy and Messer were fined $2,500 each (R. 528-530).

Decision of Court Below

These petitioners, along with PPG, appealed from the judgment of the District Court. It was contended, *inter alia*, that the District Court had erred in denying defendants' motion for production of Jonas' relevant grand jury testimony. The Court of Appeals affirmed the judgment of the District Court. It found that the accepted practice under rule 6(e) of the Federal Rules of Criminal Procedure "does not contemplate the delivery of the transcript to defense counsel without any prior inspection by the Judge" (R. 857). Since defendants had not specifically requested such a prior inspection, it was held that the District Court did not err in denying their motion.

SUMMARY OF ARGUMENT

I.

Although grand jury testimony is ordinarily confidential, it may be disclosed "in connection with a judicial proceeding." Fed. Rules Crim. Proc., rule 6(e), 18 U.S.C. In the instant case there was a compelling need for disclosure of the relevant grand jury testimony of Jonas, the principal prosecution witness, and the limited disclosure sought did not infringe upon any rationale for grand jury secrecy. Accordingly, the trial judge erred in denying defendants' motion for production.

A. The credibility of Jonas, a co-conspirator by his own admission, was a key issue at the trial. His account of the crucial Bluffs meeting, which differed materially from the accounts given by other witnesses,

was extremely damaging to these petitioners. They needed to use Jonas' grand jury testimony in order to impeach his credibility.

B. Disclosure of Jonas' relevant grand jury testimony would not have conflicted with any of the traditional reasons for grand jury secrecy. Disclosure was sought at trial in order to meet a "particularized need." *United States* v. *Procter & Gamble Company*, 356 U.S. 677, 683 (1958). Of the traditional reasons for grand jury secrecy, only that regarding encouragement of free disclosures by witnesses before the grand jury is relevant here. And even that rationale would not apply where the witness had already testified at trial and where the disclosure sought was limited to that part of the witness' grand jury testimony which related to his trial testimony.

C. Favoring disclosure is the important policy of enabling criminal defendants to obtain and utilize documents material to their defense. *Jencks* v. *United States*, 353 U.S. 657 (1957) closely parallels the instant case, and the principles announced there are applicable. See *United States* v. *Rosenberg*, 245 F. 2d 870 (C.A. 3rd, 1957). The Government was not compelled to use Jonas as a witness. But it having done so, defendants should not be denied access to documents material to testing Jonas' credibility.

II.

Defendants were entitled themselves to inspect Jonas' relevant grand jury testimony without a prior showing of inconsistency and without preliminary inspection by the trial judge. The trial judge erroneously refused inspection to defendants for failure to make a prior showing of inconsistency. It was recog-

nized in *Jencks* that it is generally impossible for defendants to make such a showing without first having access to the testimony. The Court of Appeals, in holding that defendants were not entitled to inspect the witness' grand jury testimony without prior inspection by the trial judge, erred also. As was observed in *Jencks*, only the defense is adequately equipped to discover and utilize inconsistencies. Moreover, the practice of judicial inspection requires the judge to assume a partisan role totally inconsistent with his judicial function. The Court of Appeals, which sought to avoid these difficulties by vesting trial judges with broad discretion to refuse any inspection, has devised a rule which will deprive the vast majority of criminal defendants of any opportunity to discover and use inconsistent grand jury testimony to impeach the credibility of prosecution witnesses.

ARGUMENT

I. THE TRIAL JUDGE ERRED IN DENYING PRODUCTION OF THE RELEVANT GRAND JURY TESTIMONY OF PROSECUTION WITNESS JONAS WHERE THERE WAS A COMPELLING NEED FOR DISCLOSURE AND WHERE THE LIMITED DISCLOSURE SOUGHT DID NOT CONFLICT WITH THE REASONS FOR GRAND JURY SECRECY

Jonas was the principal prosecution witness at the trial, and defendants sought his relevant grand jury testimony in order to impeach his credibility. Although proceedings before a grand jury are ordinarily confidential, rule 6(e) of the Federal Rules of Criminal Procedure provides that they may be disclosed "in connection with a judicial proceeding." In determining whether grand jury testimony should be revealed, the trial judge is "called upon to balance two policies, the one requiring secrecy, the other disclosure." *In re Grand Jury Proceedings*, 4 F. Supp. 283, 285 (E.D.

Pa., 1933). In the instant case important policies favored disclosure of Jonas' grand jury testimony, and the traditional reasons for grand jury secrecy were inapplicable in light of the limited disclosure sought. Accordingly, the trial judge erred in denying defendants' motion for production.

A. Jonas Was the Principal Prosecution Witness and His Credibility Was A Key Issue At the Trial.

The events of the stormy meeting at The Bluffs, which Jonas attended, were crucial in determining whether an agreement to fix prices was in fact made. By Jonas' own testimony, he was, prior to the Bluffs meeting, the "stumbling block" (R. 237) to any agreement. The testimony of other witnesses showed that the Asheville convention had involved no more than a series of general discussions concerning the feasibility of raising mirror prices. And the issuance of price announcements by the defendant companies directly followed the Bluffs meeting.

Buchan and Grady Stroupe, both of whom were present at The Bluffs, stated that the meeting began and ended with Messer announcing that he was "going to" raise his prices to a discount of 78 (R. 196, 205, 226, 228, 230). Both recalled Messer's parting statement that the others "could do what [they] wanted to" (R. 205, 228, 230). Their testimony raised the inference that the parties at The Bluffs were unable to agree or that, in any event, Messer had disassociated himself from any agreement and was proceeding independently.

Only Jonas testified that a price agreement was reached at The Bluffs. His testimony was particularly damaging to Messer and his two companies. Jonas said that Messer had had a "change of heart" and

"wanted to" raise his prices (R. 242, 278). He testified that Messer had "dictate[d]" the terms of the price agreement (R. 245). And Jonas strove to negative any inference that Messer had acted independently in raising his prices (R. 242, 283). That there was "pretty bitter feeling" (R. 180) between Jonas and Messer is evident from the record (see R. 278). But Messer, by virtue of the impairment of his memory, could not recall events with any clarity or reliability and did not testify in his own behalf (R. 321-329).

Although Jonas was by his own admission an active co-conspirator, neither he nor his company was indicted. He had testified before the grand jury on three occasions concerning the "same subject matter" as was covered in his trial testimony (R. 263). The importance to defendants of Jonas' grand jury testimony as a "potential instrument of impeachment" (*United States* v. *Spangelet*, 258 F. 2d 338, 340 (C.A. 2nd, 1958)) is apparent. His account of the meeting at The Bluffs given before the grand jury might well contain basic inconsistencies with his trial testimony, omit significant facts testified to at trial, contain facts omitted at trial, or shift the order or emphasis of events. Cf. *Jencks* v. *United States*, 353 U.S. 657, 667 (1957). Any of these would have been highly relevant in testing Jonas' credibility.

B. The Limited Disclosure of Grand Jury Testimony Sought By Defendants Did Not Conflict With Any of the Traditional Rationales for Grand Jury Secrecy.

Defendants' motion called for production of only limited portions of the testimony of a single grand jury witness. This witness had become the principal prosecution witness at trial, and production was sought for the purpose of cross-examining him. In such a

situation, as this Court has noted, there is a "particularized need" and grand jury secrecy is sought to be "lifted discretely and limitedly." *United States* v. *Procter & Gamble Company*, 356 U.S. 677, 683 (1958).

Moreover, none of the traditional reasons for grand jury secrecy are applicable under the facts of the instant case. These reasons have been stated as follows (*United States* v. *Rose*, 215 F. 2d 617, 628-629 (C.A. 3rd, 1954)):

> ". . . (1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to the indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

But after a grand jury has returned an indictment and the persons accused have been apprehended, several of the reasons for secrecy disappear. See *Metzler* v. *United States*, 64 F. 2d 203, 206 (C.A. 9th, 1933); *Atwell* v. *United States*, 162 Fed. 97, 100-101 (C.A. 4th, 1908). Thus, this Court has stated that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940).

In the instant case, disclosure of Jonas' grand jury testimony was sought at the trial, long after the grand jury had been discharged, and after the Government had used Jonas as a trial witness. The reasons given regarding freedom of grand jury deliberations and tampering with witnesses before trial were thus plainly inapplicable. In addition, since defendants sought only that part of Jonas' grand jury testimony which related to his trial testimony, it does not appear that the identities of prospective defendants not in custody or of innocent accused would have been disclosed.

Accordingly, of the justifications for grand jury secrecy listed above, only one—that grand jury witnesses might not make "free and untrammeled disclosures" if their testimony was later to be disclosed—need be elaborated upon. In *United States* v. *Procter & Gamble Company*, 356 U.S. 677, 681-682 (1958), it was pointed out that disclosure of the identity and testimony of a grand jury witness could lead to retaliation against him and that fear of such action might discourage free disclosures before grand juries. But once a grand jury witness has testified for the prosecution at trial, and his identity and the nature of his testimony have become known, disclosure of his grand jury testimony would no longer affect the possibility of retaliation. The likelihood of disclosure *in these circumstances* would not deter grand jury witnesses from testifying freely.

Moreover, as defendants' motion was expressly limited to subjects concerning which Jonas had already testified on direct examination (R. 259), the disclosure sought related solely to events or topics which the Government had itself raised and brought into the trial. If the witness was truthful, his account of these events

before the grand jury would have been substantially the same as that given at trial, and he would have had no reason to fear disclosure of that part of his grand jury testimony. If, on the other hand, the witness gave a different account to the grand jury, then, surely, his grand jury testimony ought not to be shielded. See *United States* v. *H.J.K. Theatre Corporation*, 236 F. 2d 502, 507 (C.A. 2nd, 1956), *cert. den., sub nom. Rosenblum* v. *United States*, 352 U.S. 969 (1957); *United States* v. *Spangelet*, 258 F. 2d 338, 341-342 (C.A. 2nd, 1958); 8 Wigmore, *Evidence* § 2362 (3rd ed., 1940).

To insure to a grand jury witness that his testimony will "be free from any possible later inquiry" would be "to invite possible perjury." *United States* v. *Ben Grunstein & Sons Company*, 137 F. Supp. 197, 201 (D. N.J., 1955). Professor Wigmore has stated (8 Wigmore, *Evidence* § 2362 (3rd ed., 1940)):

> "But obviously the secrecy that is guaranteed is only *temporary* and provisional. Permanent secrecy would be more than is necessary to render the witness willing. Moreover, it would go too far by creating an opportunity for abuse; since a corrupt witness would be able to utilize it for perjured charges. This much is now universally conceded . . ."

The position taken by the District Court and the court below regarding the secrecy of grand jury testimony could well promote perjury rather than encourage "free and untrammeled" disclosure.

C. Important Policies Favored the Disclosure Sought By Defendants.

There were clear and compelling reasons favoring the disclosure of grand jury testimony sought by defendants. Their need to test Jonas' credibility has al-

ready been considered (pp. 16-17, *supra*). And the importance to the proper administration of justice of enabling criminal defendants to obtain and utilize documents material to their defense has been repeatedly recognized. *Jencks* v. *United States*, 353 U.S. 657 (1957); *United States* v. *Andolschek*, 142 F. 2d 503, 506 (C.A. 2nd, 1944).

In order that justice be done, it has been long accepted that a witness' grand jury testimony may be revealed in order to ascertain whether it is consistent with his trial testimony.[5] Where inconsistencies are found, the right of defendants to use the contradictory grand jury testimony to impeach the witness' credibility has been "universally conceded." 8 Wigmore, *Evidence*, § 2363 (3rd ed. 1940). See *United States*

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[5] In Christian's edition of Blackstone's Commentaries, there appears the following note by the editor (at 4 Bl. Comm. 126, n. 5 (1809 ed.)):

> "A few years ago, at York, a gentleman of the grand jury heard a witness swear in court, upon the trial of a prisoner, directly contrary to the evidence which he had given before the grand jury. He immediately communicated the circumstance to the judge, who, upon consulting the judge in the other court, was of opinion that public justice in this case required that the evidence which the witness had given before the grand jury should be disclosed, and the witness was committed for perjury to be tried upon the testimony of the gentlemen of the grand jury. It was held the object of this concealment was only to prevent the testimony produced before them from being contracted [sic] by subornation of perjury on the part of the persons against whom bills were found. This is a privilege which may be waived by the crown."

See also 8 Wigmore, *Evidence* § 2360, n. 4 (3rd ed., 1940); American Law Institute, Code of Criminal Procedure (1931), § 145 and commentary.

v. *H.J.K. Theatre Corporation*, 236 F. 2d 502, 507-508 (C.A. 2nd, 1956), *cert. den., sub nom. Rosenblum* v. *United States*, 352 U.S. 969 (1957); *United States* v. *Spangelet*, 258 F. 2d 338, 341-342 (C.A. 2nd, 1958); *Herzog* v. *United States*, 226 F. 2d 561, 566-567 (C.A. 9th, 1955), aff'd *en banc*, 235 F. 2d 664, *cert. den.*, 352 U.S. 844 (1956).

In *Jencks* this Court held that defendants were entitled to inspect and use statements made to investigative agencies by prosecution witnesses simply upon a showing that the statement related to matters covered in the witness' trial testimony.[6] 357 U.S. at 668-669.

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[6] On September 2, 1957, three months after the *Jencks* decision, Congress enacted a statute, 71 Stat. 595, 18 U.S.C. 3500, setting forth procedures "for handling demands for the production of statements and reports of witnesses." S. Rep. No. 981, 85th Cong. 1st Sess., p. 2. Under subsection (b) of the new statute, defendants are entitled to inspect a "statement" upon showing that it "relates to the subject matter as to which the witness has testified." The statute makes no mention of grand jury testimony and deals exclusively with "statements" made by Government witnesses to an agent of the Government. Conference Rep. No. 1271, 85th Cong., 1st Sess., p. 3. Since "a grand jury is not a Government agent" (103 Cong. Rec. 15933) it is evident that testimony before a grand jury is not a "statement" within the meaning of the statute and that the statute has no application in the instant case. The court below concluded that the instant case "is not governed" (R. 855) by the statute and stated (R. 857):

> "Section 3500 does not profess to make, and cannot properly be read to require any alteration in the practice regarding grand jury minutes."

Accordingly, Section 3500 does not affect in any manner the authority of this Court to adopt such procedures respecting grand jury minutes, in accord with rule 6(e), as may be necessary to secure the "ends of justice" (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940)).

The close parallel between the situation in *Jencks* and that in the instant case is evident.[7] See *United States* v. *Rosenberg*, 245 F. 2d 870 (C.A. 3rd, 1957). And if defendants are entitled to inspect documents privileged on grounds of national security or protected by a valid administrative regulation, see *Jencks*, 353 U.S. at 669-672, *United States* v. *Andolschek*, 142 F.2d 503, 506 (C.A. 2nd, 1944), "[*a*] *fortiori*, access should not be denied where, as here, inspection of the grand jury minutes is a matter within judicial discretion." *United States* v. *Remington*, 191 F. 2d 246, 251 (C.A. 2nd, 1951), *cert. den.*, 343 U.S. 907 (1952).

In addition, grand jury transcripts are utilized by the prosecution in much the same fashion as are statements made to investigative agencies. Thus, both grand jury minutes and statements to investigative agencies are used by the prosecution to prepare for examination of witnesses at trial, to refresh witnesses' recollections, and to impeach witnesses who testify adversely at trial. See, e.g., *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 231-237 (1940); *Costello* v. *United States*, 255 F. 2d 389, 396-397 (C.A. 8th, 1958), *cert. den.*, 358 U.S. 830 (1958).

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[7] Cf. *Communist Party of United States* v. *Subversive Activities Control Board*, 254 F. 2d 314, 327-328 (App. D.C., 1958) where the court held that *Jencks* procedures were required to be followed in an administrative proceeding, stating (p. 328):

> "We think simple justice, the fundamentals of fair play, require no less. The opinion of the Supreme Court in the Jencks case, as we read it, is based upon the elementary proposition that the interest of the United States is that justice be done."

See also *N.L.R.B.* v. *Adhesive Products Corp.*, 258 F. 2d 403, 407-408 (C.A. 2nd, 1958); *Carlisle* v. *Rogers*, 262 F. 2d 19 (App. D.C., 1958).

The Court in *Jencks* did not deny that "vital national interests" might in some cases require that the secrecy of documents be maintained. 353 U.S. at 670. But it made clear that such national interests and policies were not to be satisfied at the expense of the interests of criminal defendants. The Court stated (quoting from *United States* v. *Reynolds*, 345 U.S. 1, 12 (1953)):

> "'. . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense . . .'" 353 U.S. at 671.

If, in the instant case, the public interest required that Jonas' grand jury testimony be kept secret, the Government could have chosen not to use Jonas as a witness. But it is "unconscionable" for defendants to be prosecuted, with Jonas as the principal witness, and then to be denied access to documents material to their defense.

II. DEFENDANTS WERE ENTITLED THEMSELVES TO INSPECT JONAS' GRAND JURY TESTIMONY

Where it is "shown or alleged that the trial testimony of a witness against the defendant is contradictory of the witness' testimony before a Grand Jury," it has been held that the defendant "must be permitted to use the contradictory Grand Jury testimony to impeach the witness." *United States* v. *H.J.K. Theatre Corporation*, 236 F. 2d 502, 507 (C.A. 2nd,

1956), *cert. den., sub nom. Rosenblum* v. *United States*, 352 U.S. 969 (1957). Even in the instant case, the trial judge indicated that he would have granted the motion for production of Jonas' grand jury testimony if defendants could have shown "some sound basis that contradicts between . . . his testimony before the Grand Jury and his testimony in this trial" (R. 259).

The difficulty, however, is that unless the witness himself discloses the contradiction, see *United States* v. *Raspovich*, 241 F. 2d 779, 780 (C.A. 2nd, 1957), defendants are without means to determine whether a contradiction exists without first having access to the witness' grand jury testimony. Thus, as this Court recognized in *Jencks*, "[r]equiring the accused first to show conflict" is in effect to deny him any real opportunity to use the witness' prior testimony for purposes of impeachment. 353 U.S. 657, 667-668. And in *United States* v. *Spangelet*, 258 F. 2d 338, 341 (C.A. 2nd, 1958) the court, relying upon *Jencks*, thought it "now abundantly clear that a defendant's access to the grand jury minutes does not depend on a showing that the witness' testimony was inconsistent with that he gave before the grand jury."

Although the court below agreed with the view taken in *Spangelet* that "a prior showing of inconsistency" is no longer necessary (R. 857), it nonetheless sustained the trial judge's denial of defendants' motion. The court below thought that defendants were entitled at most to have the trial judge inspect the grand jury minutes, and, since they had failed specifically to request such an inspection,[8] there was no error (R. 857).

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[8] But see *United States* v. *Consolidated Laundries Corporation*, 159 F. Supp. 860, 862 (S.D.N.Y., 1958) and *United States* v. *Rosenberg*, 146 F. Supp. 555, 561-562 (E.D. Pa., 1956), rev'd

In *Jencks*, however, this Court held, regarding F.B.I. reports of prosecution witnesses, that a defendant is "entitled to inspect the reports to decide whether to use them in his defense." 353 U.S. 657, 668. The Court continued (p. 668-669):

> "Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less."

In *United States* v. *Rosenberg*, 245 F. 2d 870 (C.A. 3rd, 1957), it was held that the inspection procedures outlined in *Jencks* applied not only to statements made to investigative agencies but to grand jury testimony as well. Accordingly, the court rejected the practice of *in camera* inspection by the trial judge and held that refusal to permit defense counsel to inspect the grand jury testimony of a prosecution witness constituted reversible error. The court stated (p. 871):

> "The failure of the trial judge to permit counsel for the defendant to inspect at the trial the witness' grand jury testimony and statement to the F.B.I., as required by the rule announced in the Jencks case, compels us to grant a new trial."

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245 F. 2d 870 (C.A. 3rd, 1957), where, although inspection of grand jury testimony by defense counsel was denied, the trial judge *volunteered* to make inspection himself.

In the instant case, defendants asked for "production" of Jonas' grand jury testimony (R. 259). Without pausing to clarify the precise nature of this request, the trial judge ruled categorically that, absent a prior showing of inconsistency, he was "not going to require the production of the Grand Jury records" (R. 259).

See also *United States* v. *Carr*, 21 F.R.D. 7, 9 (S.D. Calif., 1957).

That the procedure of inspection by the trial judge is burdensome and "has serious drawbacks" (R. 857) has been recognized by the court below and by other Courts of Appeal. See *United States* v. *Alper*, 156 F. 2d 222, 226 (C.A. 2nd, 1946); *Herzog* v. *United States*, 226 F. 2d 561, 566-567 (C.A. 9th, 1955), aff'd *en banc* 235 F. 2d 664, *cert. den.*, 352 U.S. 844 (1956). Thus, if the grand jury transcript is lengthy, the time necessary for its careful examination might delay the trial unduly or impose an unfair burden on the trial judge.

Moreover, in examining a witness' grand jury testimony for inconsistencies, the trial judge would be compelled to assume an essentially partisan attitude which would be wholly inconsistent with his judicial function. As noted by the court below, the trial judge would be drawn "into the partisan task of preparing the cross-examination" (R. 858). It was said in *Alper* that to require the judge to make a careful examination of a lengthy transcript would be "to falsify his position" and render him "an active assistant of the defense." 156 F. 2d 222, 226. Such a role would, as stated in *Herzog*, be "contrary to every concept of proper judicial functions." 226 F. 2d 561, 567.

Evidence of the unworkability of a system of judicial inspection is to be found in *United States* v. *Spangelet*, 258 F. 2d 338, 341-342 (C.A. 2nd, 1958). There the trial judge, following the approved procedure in that circuit, inspected the grand jury testimony of a prosecution witness but failed to discover an inconsistency which was later found by the appellate court. The court's only suggestion regarding a means of meeting this difficulty is that "a prosecutor, who by

opposing a defendant's access to grand jury minutes casts the burden of comparison upon the court, owes the court his own best effort himself to locate inconsistencies . . ." 258 F. 2d at 342. But in an adversary system of criminal justice, reliance upon the prosecutor to discover inconsistencies for use by the defendant in impeaching the credibility of the prosecutor's own witness can hardly be reassuring. The court's final observation is revealing (p. 342):

> "We also observe that in this case this error would never have occurred if the prosecutor on request had provided the defense, as the judge suggested, with a copy of the witness's grand jury testimony."

If, as in *Spangelet*, a clear contradiction can pass unnoticed during a trial judge's inspection, more subtle evidence of inconsistency, such as omissions or shifts in emphasis or order, will almost certainly go undetected. As pointed out by the court below, the trial judge "may not be able readily to absorb and evaluate every nuance in an extensive transcript" (R. 857-858).

But the solution offered by the court below for these "serious drawbacks" that it recognizes in the practice of inspection by the trial judge is to endow the trial judge with broad discretion to refuse to inspect at all, and thereby deprive defendants of even indirect access to the grand jury testimony. The court stated (R. 858):

> "From time to time instances may arise in which it will appear to the Judge wise and just to read the transcript to check a particular point sharply in issue, but the minute examination, during the trial, of elaborate grand jury minutes should not be expected of him."

Under the rule stated below, a trial judge "may" make inspection when "the circumstances seem . . . appropriate" (R. 857). In addition, if the trial judge makes an inspection and finds inconsistencies, he is not required to bring them to the defendant's attention unless he "deems it in the interest of justice" to do so (R. 857).

The rule announced by the court below contains only the vaguest standards for both trial judges and courts of review. Moreover, in all but the occasional cases where the trial judge chooses both to inspect and to inform the defendant of his findings, or where the witness himself discloses a contradiction, defendants will be denied any opportunity to use contradictory grand jury testimony to impeach the credibility of prosecution witnesses. The rule stated by the court below will for most defendants be no improvement upon the rule which requires a prior showing of inconsistency. And the policy, recognized in *Jencks*, of enabling defendants in criminal cases to obtain and utilize documents needed for their defense will be largely defeated.

Defendants in the instant case were entitled themselves to inspect Jonas' grand jury testimony since this was the only effective means whereby inconsistent testimony could be discovered and utilized. Accordingly, the trial judge erred in denying defendants' motion for production because of their failure to make a prior showing of inconsistency; and the court below erred in holding that defendants were not entitled to inspect the witness' grand jury testimony "without any prior inspection by the Judge" (R. 857).

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the cause remanded to the District Court for a new trial.

Respectfully submitted,

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